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No. 16

Supreme Court of the United States

OCTOBER TERM, 1963

BANCO NACIONAL DE CUBA,

Petitioner,

v.

PETER L. F. SABBATINO, as Receiver, and F. SHELTON PARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR NORTH AMERICAN SUGAR INDUSTRIES, INC. (FORMERLY THE CUBAN-AMERICAN SUGAR COMPANY) AND THE CUBAN AMERICAN SUGAR MILLS COMPANY, AS AMICI CURIAE

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October 4th, 1963

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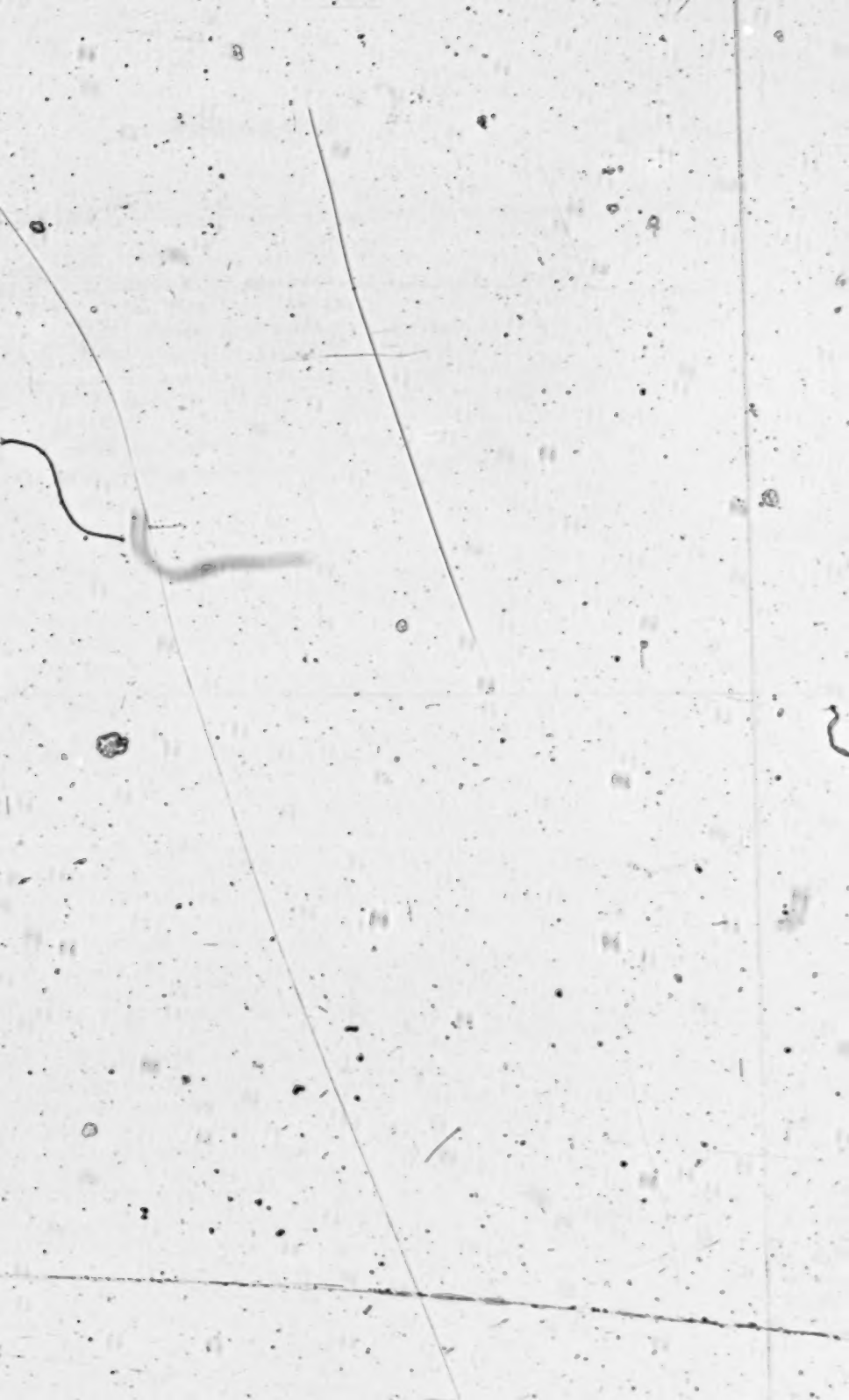

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North American Sugar Industries, Inc. (formerly The Cuban-American Sugar Company) and The Cuban American Sugar Mills Company file this brief as amici curiae with the consent, submitted herewith, of all parties to this action.

INTEREST OF AMICI CURIAE

The properties in Cuba of The Cuban American Sugar Mills Company, a wholly-owned subsidiary of North American Sugar Industries, Inc., were taken by the Castro Government of Cuba in the same manner and under the same decrees as those of Compania Azucarera Vertientes-Camaguey de Cuba (hereinafter called "C.A.V."). The decision in this case will affect cases arising out of the taking from The Cuban American Sugar Mills Company—notably cases pending in the courts of the United Kingdom, where the English courts, in past cases such as *Luther* v. *Sagor,* [1921] 3 K.B. 532 (C.A.), have relied heavily upon the opinions of this Court in considering the effect of confiscations upon citizens of the confiscating state. In the United Kingdom there are no foreign exchange control regulations such as those promulgated here in July, 1963, to forestall collection by the Castro Government of an award in its favor. (U. S. Treasury Regulations, 28 Fed. Reg. 6974, § 515.201.)

North American Sugar Industries, Inc. and The Cuban American Sugar Mills Company, as amici curiae, were permitted to file a brief and to participate in oral argument before the Court of Appeals.

PROCEEDINGS BELOW

Petitioner, Banco Nacional de Cuba, an agency of the Cuban Government, brought suit in the United States District Court for the Southern District of New York against Peter L. F. Sabbatino, the Temporary Receiver of C.A.V., and against Farr, Whitlock & Company to recover the proceeds of a shipment of sugar. Judge Dimock of that Court, in an opinion dated March 31, 1961, gave summary judgment

dismissing the complaint. The nub of Judge Dimock's *ratio decidendi* is:

> "Since the Cuban expropriation measure is a patent violation of international law, this Court will not enforce it." (193 F. Supp. 375 at 386.).

Banco Nacional de Cuba appealed to the Court of Appeals for the Second Circuit. There amici argued for affirmance of the decision of the District Court "for the reasons stated in the opinion" (Motion of Amici For Leave to File Brief, p. 4). The Court of Appeals affirmed the decision of the District Court but advanced reasons additional to those of the District Court and different from those then or now urged by amici or either Respondent.

Upon petition of Banco Nacional de Cuba, certiorari was granted. 372 U.S. 905.

QUESTIONS PRESENTED

1. Does the Cuban decree of confiscation, here sought to be enforced by Petitioner, violate international law?

2. Are the courts of the United States under a duty to apply international law?

3. Must a court receive prior permission of the Executive Branch before testing a foreign decree, to which it is asked to give effect, against the standards of international law?

4. If this Court, in deference to the Executive Branch, feels obliged to accept the Executive Branch's view in this case that its permission is a prerequisite to the application of international law to the foreign decree sought to be enforced, and such permission is not forthcoming, what disposition should the Court

make of this case; *i.e.*, should it adjudicate on the merits without reference to part of the governing law or should it decline to adjudicate, by directing either dismissal of the complaint or postponement of adjudication until a time when the policy of the Executive is consistent with complete adjudication on the merits?

SUMMARY OF ARGUMENT

*"We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice."**

These words, although spoken by this Court in a different legal context, aptly describe the situation here. An agency of the Cuban Government, as plaintiff, invokes our law to help it obtain dollar proceeds of sugar from the very company from whom Cuba seized the sugar, but resists the application of that part of our law which would measure its seizure against international law. It wants our courts' process used, but used blindly and without reference to international law.

The view of amici curiae is that the lower courts were correct in refusing to give effect here to the Cuban decree which violated international law.

The Cuban decree, upon which Cuba here bases its claim and which it here seeks to have enforced, violated international law on three independent grounds: it was discriminatory, it was retaliatory and it was confiscatory. These violations of international law were compounded, as the very decree here in issue expressly pro-

* National Bank v. Republic of China, 348 U.S. 356 at 361-62.

vided that there could be "no remedial action" in the Cuban courts. The United States formally declared in notes of protest to the Cuban Government that the seizures, being "discriminatory, arbitrary and confiscatory", were "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West". 43 Dep't State Bull. 141, 171 (1960).

The violations of international law occasioned by the Cuban decree give rise under international law to the right of restitution. The United States formally declared in a note of protest to the Romanian Government that the United States refuses "to recognize the validity of . . . expropriations in cases where they are discriminatory . . . ." 19 Dep't State Bull. 408 (1948).

As this Court has repeatedly declared, and as the United States Government formally assured the International Court of Justice in the *Interhandel Case*, the courts of the United States are free to apply the principles of international law, and indeed are under a duty to do so because international law is a part of the law of the land.

The fact that the decree here sought to be enforced by the Cuban Government is an act of a foreign sovereign does not relieve our courts of their duty to measure it against the standards of international law and decline to give it effect if it violates international law. No precedent has ever extended the doctrine of deference to the act of a foreign sovereign to cases where that act violated international law. Much less is there any precedent for an American court to give effect here to a foreign decree which (a) was expressly in retaliation of acts of our Government, (b) effected a taking without payment of compensation, (c) ex-

pressly discriminated against nationals of the United States, (d) had been protested by the State Department as a violation of international law, (e) was sought to be enforced here by the taking government, (f) after that government had expressly closed its courts to American nationals.

In the *Bernstein* litigation, Judge Hand did not lay down a rule that prior consent of the Executive Branch to the application of international law to a foreign act must be obtained since the *Bernstein* litigation did not (indeed could not) involve a violation of international law. What Judge Hand noted was the need for Executive clarification of the Four-Power Declaration and its subsidiary laws providing for Military Government sequestration of claims, such as that of Mr. Bernstein, and their consequent "adjudication locally [in occupied Germany]." 163 F. 2d at 250-51.

The duty of our courts to apply international law as a part of the law of the land cannot be laid aside for reasons of expediency and convenience.

Furthermore, the argument that the conduct of our foreign relations will be made more difficult by judicial application of international law to acts of state is, we submit, based upon a misapprehension of the results which follow from judicial refusal to give effect here to foreign acts in violation of international law.

Even if this Court feels constrained, out of deference to the views expressed for the Executive Branch, to refrain from measuring acts of a foreign sovereign—to which our courts have been asked to give effect—against the standards of international law, it should dispose of this case by declining to adjudicate it. The courts are under a duty not to decide on the merits in disre-

gard of essential applicable law. If, for reasons of high state policy, certain issues must be disregarded, the proper disposition of the case is to dismiss the action on the ground that it has become nonjusticiable or to postpone decision on the merits until the essential issues in the case become justiciable.

ARGUMENT

Amici will, so far as possible, adopt and not repeat the arguments and authorities in the other briefs which support affirmance of the decision of the lower courts.

I. THE LOWER COURTS RULED CORRECTLY THAT THE CUBAN SEIZURE OF THE SUGAR WAS A CONFISCATION IN VIOLATION OF INTERNATIONAL LAW.

A. THE CUBAN DECREE OF CONFISCATION, HERE SOUGHT TO BE ENFORCED, VIOLATED INTERNATIONAL LAW ON THREE SEPARATE GROUNDS.

The Cuban decree of confiscation, here sought to be enforced, violated international law on three separate grounds. In its protest notes to the Cuban Government at the time of the decree and again at the time of the seizure, the Department of State declared that it was "in its essence discriminatory, arbitrary and confiscatory."[1]

The seizure under the Cuban decree was *discriminatory.* That discrimination against aliens is a violation of international law is well documented in the C.A.V. Brief, pp. 41-46 and the A.B.A. Brief, pp. 10-12. Amici adopt the arguments on this point in the briefs cited. Both lower courts, as well as the Department of State, have agreed that the seizure was a discrimination in violation of international law.

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[1] 43 Dep't State Bull. 141, 171 (1960).

The seizure under the Cuban decree was *retaliatory* and was not related to a valid public purpose. That the seizure is a violation of international law on this ground is well documented in the C.A.V. Brief, pp. 41-46, the City Bar Brief, pp. 32-42 and the A.B.A. Brief, pp. 6-9. Amici adopt the arguments on this point made in the cited briefs, and note again that this proposition has been sustained by the objective evaluation of the two lower courts and by the Department of State as well.

The seizure under the Cuban decree was *confiscatory*. That failure to pay compensation for taking is a violation of international law is well documented in the C.A.V. Brief, pp. 32-41, the City Bar Brief, pp. 32-42, the A.B.A. Brief, pp. 13-22, and the American Branch—I.L.A. Brief, Point II. Amici adopt the arguments on this point in the briefs cited. The District Court and the Department of State independently agreed that the Cuban decree was a violation of international law because it failed to provide adequate compensation.

Compounding the three independent violations of international law outlined above is the fact that the Castro Government has failed to provide any means of obtaining reparation in the Cuban courts. Indeed, in the very decree here at issue the Castro Government expressly stated that there could be "no remedial action" by the Cuban courts.[2] Cuban Law No. 851, Article 6, Petitioner's Brief, p. 64.

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[2] Even if access to the Cuban courts were theoretically available, the Castro Government has wholly undermined the freedom of the Judiciary. The Department of State Publication No. 7171 (1961), entitled "Cuba," states: "In recent months the regime, by completing its purge of the judiciary, has perfected its control over all organized institutions of political power. Justice is now the instrument of tyranny" (pp. 13-14). See Farr Brief, Appendix B, p. 46.

B. THE VIOLATION OF INTERNATIONAL LAW WAS SUCH AS TO ENTITLE C.A.V. TO RESTITUTION.

Petitioner contends, in Point VI of its Brief, that even if the seizure of the sugar by Cuba was an international wrong, C.A.V.'s only remedy is "for damages in an international forum."

Petitioner's argument overlooks the fact that the violation of international law in this case was not restricted to inadequacy of the compensation offered, or even to the failure to make or offer any compensation. In the circumstances of this case the act of taking, because of its discriminatory and retaliatory aspects, was itself a violation of international law.

The State Department has clearly stated the view maintained by our Government:

> "While the United States Government has consistently recognized the right of a sovereign power to expropriate property subject to its jurisdiction and belonging to American nationals, the United States has likewise refused to *recognize the validity* of such expropriations in cases where they are discriminatory by nature and effect . . . ."[3] (Italics added.)

In a case such as this an international court would, if requested, order restitution of the property seized.

In *Case of the Factory at Chorzów (Indemnity) (Germany* v. *Poland)*, P.C.I.J., ser. A, No. 17, 4, 47-48 (1928), 1 Hudson, World Court Reports 475, 677-78, the Permanent Court of International Justice held:

> "The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in

[3] Note of September 7, 1948, to the Romanian Government, 19 Dep't State Bull. 408 (1948).

> particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

While both parties "agreed" to the "impossibility" of "restoring the Chorzów factory", the Court noted that the damages which had to be substituted would not be the same as those given if the act had been legal under international law and the question were simply determining the compensation due for a rightful taking.[4]

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[4] "When an internationally illegal act has been committed, it is incumbent upon the injuring state chargeable therewith to restore the situation exactly to its former state; or, if this is impossible, to substitute in such manner, and to such an extent, as will be considered to have repaired the injury." Eagleton, The Responsibility of States in International Law 182 (1928). *Accord*, Hudson, The Permanent Court of International Justice 425 (1934); II Whiteman, Damages in International Law 857 (1937); Personnaz, La Réparation du Préjudice en Droit International Public 74-77 (1938); I Schwarzenberger, International Law 268, 282 (3d ed. 1952).

Restitution in kind was considered as either obligatory or permissible by all but one of the states which expressed themselves on the subject in the discussion leading up to the Hague Conference of 1930. League of Nations, 3 Bases of Discussion, Conference for the Codification of International Law 146-148 (1929).

An international court has equitable powers and its declaration of a remedy is essentially an equitable function. Judge Hudson,

Moreover, two cases in which the aggrieved party sought, and was granted, an order for restitution are *Affaire des propriétés religieuses* (*France, Great Britain and Spain* v. *Portugal*), 1 U. N. Rep. Int'l Arb. Awards 9 (1920), Scott, The Hague Court Reports (2d ser.) 1, and *Affaire Junghans* (*première partie*) (*Germany* v. *Romania*), 3 U. N. Rep. Int'l Arb. Awards 1847 (1939).[5]

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of the United States, concurring in the *Diversion of Water from the River Meuse Case* (*Netherlands* v. *Belgium*), P.C.I.J., ser. A/B, No. 70 (1937), 4 Hudson, World Court Reports 172, 233.

Thus, when the International Court of Justice found that the right of diplomatic asylum had been improperly granted, its order was that the asylum, still being continued, should cease. *Asylum Case* (*Colombia* v. *Peru*), (1950) I.C.J. Rep. 266. When a state had imposed customs barriers within its territory, but in violation of a treaty obligation, the order of the Permanent Court was that the customs barriers be removed. *Case of the Free Zones of Upper Savoy and the District of Gex*, P.C.I.J., ser. A/B, No. 46, 96, 172 (1932), 2 Hudson, World Court Reports 448. When a state had wrongfully withdrawn commercial concessions granted to an alien, the order was that the concessions should be restored and respected for their duration as granted. *Affaire de la compagnie d'électricité de Varsovie* (*France* v. *Poland*) (Fond) (Principe), 3 U.N. Rep. Int'l Arb. Awards 1679 (1932).

[5] In the Junghans case, Germany admitted that restitution was impossible, but asked the court to hold that it was in principle required. The court ordered that Romania restore the property or, if that were impossible, pay damages.

In *Affaire des forêts du Rhodope central* (*Greece* v. *Bulgaria*), 3 U.N. Rep. Int'l Arb. Awards 1405, 1432 (1933), 28 Am. J. Int'l L. 773, 802 (1934), restitution was denied but on the grounds that the claimants were entitled only to a fractional share of the property, its condition must have changed considerably since the seizure, and the rights of innocent third parties apparently had or might have supervened.

In *Walter Fletcher Smith Claim* (*United States* v. *Cuba*), 2 U.N. Rep. Int'l Arb. Awards 915, 918 (1929), 24 Am. J. Int'l L. 384, 387 (1930), the tribunal recognized its power to grant restitution

International law and the law of the United States are fully in accord on this point. It is settled American doctrine that one who has been deprived of his property by an unlawful exercise of the power of eminent domain may bring an action of ejectment and is entitled to have his property restored to him. *United States* v. *Lee*, 106 U.S. 196; *United States* v. *Crown Zellerbach Corporation*, 60 F. Supp. 853, 860 (D. Ore. 1945); *United States* v. *Certain Land in Falls Tp.*, 38 F. 2d 109, 110 (E.D. Pa. 1930).[8] It is equally settled that even when the power of eminent domain is properly exercised, title does not pass to the Government until full compensation has been paid. *Danforth* v. *United States*, 308 U.S. 271, 284; *United States* v. *Lynah*, 188 U.S. 445, 470; *Cherokee Nation* v. *Kansas*

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but held that it would grant damages instead because of "the best interests of the parties, and of the public."

"There are numerous instances in which restitution has been directed as a remedy for takings in violation of the customary or conventional law of war." Sohn and Baxter, Convention on the International Responsibility of States for Injuries to Aliens (Draft No. 12 with Explanatory Notes, Harvard Law School, 1961, 216). Articles 10 and 32 of this draft convention provide that restitution shall, if possible, be made of any property taken in violation of a treaty or "if it is not for a public purpose clearly recognized as such by a law *of general application* in effect at the time of the taking . . ." (Italics added.) Thus, under this convention, the discriminatory aspect of the instant seizures would alone be enough to make restitution the proper remedy.

[8] Since the enactment of the Tucker Act (March 3, 1887, c. 359, 24 Stat. 505), 28 U.S.C. § 1346, an owner dispossessed by the United States may not succeed in ejectment solely on the ground that compensation was not paid, since he has a remedy by an action for damages under the Tucker Act and Congress' provision of that remedy is held to render the taking itself lawful. See Yearsley v. Ross Constr. Co., 309 U.S. 18; Hurley v. Kincaid, 285 U.S. 95. But if the taking is wrongful for some reason other than the failure to pay compensation, ejectment will lie.

Railway Co., 135 U.S. 641, 659; *Bauman* v. *Ross*, 167 U.S. 548, 598-99; *Backus* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 568-69.

It must be re-emphasized that C.A.V. is not in the position of a claimant seeking restitution of property in the hands of Petitioner. C.A.V. is defending itself against Petitioner's demand that the courts of the United States use their power to transfer to Petitioner property the claim to which rests, by Petitioner's own hypothesis in this phase of the case, on a seizure made in violation of the law of nations. This demand should be refused.

Moreover, what is at issue here is the right to the *money proceeds* of the property seized by Petitioner from Respondent C.A.V. Those proceeds are equivalent to the damages which by Petitioner's own hypothesis could be recovered by an action in an international court. Thus the decision below, permitting C.A.V. to keep the proceeds of the sale of the sugar, leaves the parties in exactly the position in which, by Petitioner's own contention regarding damages, they ought to be.[1]

II. This court is under a duty to apply international law to this case.

Case law, commentary and successive Secretaries of State have recognized that international law is part of

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[1] The Court's attention is respectfully called to the argument of Respondent C.A.V. at page 56 of its Brief that it has a valid counterclaim against Petitioner for the full value of its confiscated assets. Propriety of adjudication by a United States court of a claim against a sovereign by way of set-off is firmly established. National Bank v. Republic of China, 348 U.S. 356, 361-62. On the very assumption made in Point VI of Petitioner's Brief, this set-off would be proper.

the law of the land and as such is to be applied by all American courts in controversies where international law is in issue. As early as *The Nereide*, 13 U.S. (9 Cranch.) 388, in 1815, this Court reversed a lower-court decision for failure to apply the law of nations. The Court held:

> "If it be the will of the government, to apply to Spain any rule respecting captures, which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Until such an act be passed, the Court is bound by the law of nations, which is a part of the law of the land." 13 U.S. (9 Cranch.) at 423.

In *Hilton* v. *Guyot*, 159 U.S. 113, and in *The Paquete Habana*, 175 U.S. 677, this Court again reversed lower-court decisions for failure to apply international law. Citing *Hilton* v. *Guyot*, the Court in *The Paquete Habana* observed:

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." 175 U.S. at 700.

In 1948 Judge Learned Hand recognized the binding force of international law upon the courts in *Bergman* v. *De Sieyes*, 170 F. 2d 360 (2d Cir. 1948).[8]

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[8] See Skiriotes v. Florida, 313 U.S. 69, 72, 73; MacLeod v. United States, 229 U.S. 416, 434; Riddell v. Fuhrman, 233 Mass. 69, 123 N.E. 237, 239 (1919); Aboitiz & Co. v. Price, 99 F.Supp. 602, 609 (D. Utah 1951) ("... we may refuse recognition to all measures taken by Japan in violation of the rules of international law ...."); Peters v. McKay, 195 Ore. 412, 238 P.2d 225 (1951); United States v. Melekh, 190 F.Supp. 67 (S.D.N.Y. 1960). See also, 1 Hyde, International Law, § 5 at 17 (2d rev. ed. 1945);

The force of the rule laid down in *The Nereide* was recognized in 1956 in an address by an Assistant Legal Adviser of the State Department. According to him the case stands for the rule "that in the absence of an act of Congress 'the court is bound by the law of nations which is a part of the law of the land.' "[9]

The State Department, in a letter dated January 11, 1957, refused the suggestion of the Minister of Switzerland to enter into arbitration in the *Interhandel Case* and enclosed a memorandum in which it was stated:

> "United States courts are known for their independence and readiness to do justice at the suit of all, regardless of whether the suitor is an alien or whether the United States Government is the party against whom complaint is brought. These courts have a continuing preoccupation to maintain the principles both of American constitutional law and of international law that property may not be taken from citizen or alien without due process of law and that for every taking claimed to be illegal there must be a full remedy." *Interhandel Case*, (1959) I.C.J. Pleadings, Oral Arguments, and Documents 52, 55-56.

Mr. Loftus Becker, Legal Adviser to the State Department, at the oral argument of November 6, 1958, in the *Interhandel Case*, answered the Swiss charge

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Jessup, *The Doctrine of Erie Railroad* v. *Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740, 742 (1939); Wright, The Enforcement of International Law through Municipal Law in the United States (1916); Dickinson, *The Law of Nations as Part of the National Law of The United States*, 101 U. Pa. L. Rev. 26, 792 (1952-1953); 1 Whiteman, Digest of International Law 103-108 (1963). See A.B.A. Brief, p. 4, American Branch—I.L.A. Brief, Point I(A).

[9] Address of Leonard C. Meeker, April 20, 1956, 1 Whiteman, Digest of International Law 107 (1963).

that under American conceptions international law is not the law of the land by declaring to the World Court on behalf of the United States:

> "[T]hat international law is applied and administered by our domestic courts as the law of the land is so firmly established by numerous decisions of our Supreme Court that it cannot seriously be questioned." *Interhandel Case*, (1959) I.C.J. Pleadings, Oral Arguments, and Documents 497, 504.

The International Court of Justice took note of the competence of our courts to apply international law in the *Interhandel Case* (Preliminary Objections), Judgment of March 21, 1959. The court remarked:

> ". . . [T]he decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary." (1959) I.C.J. Reports at 28.

There is an impressive history of statements by Secretaries of State encouraging the courts to assist in upholding international law.[10]

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[10] As early as June 5, 1793, Thomas Jefferson, speaking as Secretary of State, wrote to M. Genet, French Minister: "The law of nations makes an integral part of the laws of the land." I Moore, Digest of International Law 10 (1906). This was supported by an opinion of Attorney General Randolph given June 26, 1792: "The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land." 1 Ops. Att'y Gen. 27.

On March 16, 1906, Secretary of State Root reminded the Secretary of Commerce and Labor: "International law is as much the law of the land as is a Statute." IV Hackworth, Digest of International Law 460-461 (1942).

On April 16, 1943, Secretary of State Cordell Hull wrote to the Administrator, War Shipping Administration, urging the appli-

It is clear, then, that the lower courts were both competent and under a duty to administer international law, and that successive Secretaries of State have recognized the duty of the courts to harmonize their decisions with the requirements of international law.

III. The duty of our courts to apply international law is not lifted when the act to be measured against its standards is an "Act of State."

A. No Anglo-American precedent requires a forum to give effect to a foreign act of state which violates international law.

As is amply documented in the C.A.V. Brief, pp. 12-23, the City Bar Brief, pp. 26-28, and the American Branch—I.L.A. Brief, Point III, no American decision has ever held that the so-called "act of state doctrine" prohibits a court from inquiring as to whether a foreign decree, sought to be enforced here by the foreign government, violates international law.

A fortiori no previous case has presented the issue of whether to give effect here to a foreign decree which (a) was expressly in retaliation of acts of our Government, (b) affected a taking without payment of compensation, (c) expressly discriminated against nationals of the United States, (d) had been protested by the State Department as a violation of international law, (e) was sought to be enforced here by the taking

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cation of the principles of international law in fixing compensation for requisitioned Danish ships. He enclosed a memorandum reminding the Administrator "that international law is to be considered as forming part of the law of the land, that it is as such to be judicially administered in all cases to which it is applicable." House Committee on Merchant Marine and Fisheries, *Compilation of Material on the Determination and Payment of Just Compensation for Vessels Requisitioned Under Section 902 of the Merchant Marine Act, 1936*, Committee Doc. No. 20, 78th Cong., 1st Sess. at 167, 168, 173.

government, (f) after that government had expressly closed its courts to American nationals.

The efforts of the Petitioner and of the Government to stretch *Underhill* v. *Hernandez, Oetjen* v. *Central Leather Co., Ricaud* v. *American Metal Co.* and *Shapleigh* v. *Mier*,[11] are without merit. Their attempt to use what this Court recently referred to as the overly "sweeping" language of *Oetjen*[12] to prove that no act, however repugnant, of a foreign government may ever be questioned in our courts goes too far,[13] as

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[11] Underhill v. Hernandez, 168 U.S. 250; Oetjen v. Central Leather Co., 246 U.S. 297; Ricaud v. American Metal Co., 246 U.S. 304; Shapleigh v. Mier, 299 U.S. 468.

[12] Baker v. Carr, 369 U.S. 186 at 211.

[13] The Government's suggestion that the application of the "act of state rule" to the case at bar is in a lineal descent from the ancient case of Blad v. Bamfield, 3 Swan. 604, 36 Eng. Rep. 992 (Chancery 1674) is, we submit, poor history. The attention of this Court is called to the earlier Blad's Case, 3 Swan. 603, 36 Eng. Rep. 991 (Privy Council 1673), in which the Lord Chancellor Nottingham had taken a different position. Furthermore, the Court's attention is called to two later English cases where the King's Bench and the Chancery courts respectively held that they were not obliged to give effect to foreign acts of state which violated international law: Wolff v. Oxholm, [1817] 6 M.&S. 92, 105 Eng. Rep. 1177 (K.B.) (where Chief Justice Ellenborough refused to give effect to a confiscatory Danish ordinance enacted as a reprisal against England, which he found to violate international law) and In re Fried Krupp Actien-Gesellschaft, [1917] 2 Ch. 188, 194 (Ch.) (where Younger, J., confronted with a German ordinance which violated a convention to which Germany and Britain were parties, refused to give effect to it on two grounds, the second of which was that the German ordinance was "one which is not conformable to the usage of nations, and which, therefore, Messrs. Wild could not expect, and which neither they nor we are bound to regard.")

The Government at page 20 of its Brief erroneously described the cases of Luther v. Sagor, [1921] 3 K.B. 532 (C.A.) and Princess

is adequately documented by the Brief of Farr, Whitlock & Co. at pp. 18-28 and by the City Bar Brief at pp. 15-19. Indeed, this Court has held that a foreign sovereign may have its sovereign acts "questioned" to the point of having to pay damages, by way of set-off, for having committed them. *National Bank* v. *Republic of China;* 348 U.S. 356, 361-62.

To the discussion in the briefs just cited we would like to add only that in *Shapleigh,* Mr. Justice Cardozo said that the question was "the efficacy of the decree under the land law of Mexico . . ." and pointed out that any question of violation of international law had been removed from our courts to the forum of "the International Claims Commission, established by convention between the United States and Mexico, to which the plaintiffs are at liberty to submit and have long ago submitted a claim for reparation. *Convention of September 8, 1923,* proclaimed March 3, 1924; 43 Stat. 1730."[14]

The Solicitor General in Point II-A of the Government Brief suggests that prior approval of the Executive Branch, by means of a "Bernstein letter",

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Paley Olga v. Weisz, [1929] 1 K.B. 718 (C.A.), as though they involved foreign decrees which violated international law. They did not, as Upjohn, J., made clear in his discussion of them in In re Claim by Helbert Wagg & Co., [1956] Ch. 323 at 346 (Ch. 1955). Indeed, on the question of whether an English court is entitled to examine a foreign law, sought to be given effect, Upjohn, J., specifically held that:

> ". . . this court is entitled to be satisfied that the foreign law . . . is not a law passed ostensibly with that object [protecting the economy], but in reality with some object not in accordance with the *usage of nations.*" [1956] Ch. 323 at 351-52. (Italics added.)

[14] 299 U.S. 468 at 471.

is necessary before a court can apply international law to a foreign decree. There is nothing in any of the *Bernstein* cases* to support this proposition. Judge Learned Hand described the act of state doctrine as a prohibition on passing "upon the validity under the *municipal* law of another state of the acts of officials of that state . . . ." 163 F. 2d at 249. (Italics added.)[15] No violation of international law could have been involved in *Bernstein* since the taking was by Germany from a German national.

Judge Hand, presented with plaintiff's assertion that the Four-Power Declaration, after World War II, assuming supreme authority with respect to Germany, and the laws passed under it, permitted our courts to pass upon the "legal effect" (163 F. 2d at 249) to be given in New York to the acts of Nazi officials, noted need for clarification of what he considered to be an ambiguous Declaration. In his view, the "real obstacle in his [plaintiff's] path" was "not the absence of any substantive law—the law of New York—making the

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*Bernstein v. Van Heyghen Frères Société Anonyme, 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772; Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

[15] The same court a few years later passed upon the validity of the act of another state under international law and, finding the taking there involved to be in violation of international law, refused to give effect here to a claim of title based on the taking. State of the Netherlands v. Federal Reserve Bank, 201 F. 2d 455 (2d Cir. 1953).

See also Sulyok v. Penzintezeti Kozpont Budapest, 279 App. Div. 528, 111 N.Y.S. 2d 75 (Sup. Ct. 1st Dept. 1952); Frenkel & Co. v. L'Urbaine Fire Ins. Co., 251 N.Y. 243, 167 N.E. 430 (1929); Perutz v. Bohemian Discount Bank in Liquidation, 304 N.Y. 533, 110 N.E.2d 6 (1953).

transfer invalid, but that no court of that, or any other state, is permitted to apply that law, *since the claim is reserved for adjudication along with all other such claims as part of the final settlement with Germany.*" 163 F. 2d at 252. (Italics added.) The "Bernstein exception" accordingly goes no further.[16] There has not, of course, been any "final settlement" with Cuba.

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[16] Referring to the discussion in the Government Brief of the "Laylin correspondence," it should be noted that counsel for amici did not represent to the Court of Appeals that the letters received by him from the Legal Adviser and the Under Secretary of State constituted a "Bernstein letter."

This correspondence was filed with the Court of Appeals to rebut the assertion, made by another counsel in an affidavit to the Court of Appeals, that the State Department, in Rich v. Naviera Vacuba, S.A. (The Bahia de Nipe), 295 F.2d 24 (4th Cir. 1961); had changed its former position as represented by its diplomatic notes to Cuba and that it now recognized the validity of the Castro Government's seizures. As shown by the correspondence, the Legal Adviser made plain that the State Department had not changed the position previously taken in its diplomatic notes by virtue of the statements brought to the attention of the Fourth Circuit in The Bahia de Nipe. The Second Circuit was so informed by counsel for amici, who argued that the Executive's statements in The Bahia de Nipe case did not constitute a "Bernstein-letter-in-reverse." Nevertheless Petitioner even now asserts to this Court that they do constitute a "Bernstein-letter-in-reverse." (Petitioner's Brief, p. 26.) Neither the Government's Memorandum nor its Brief on the Merits suggests that the State Department's statements in The Bahia de Nipe did reflect a change of position. Furthermore, the "Laylin correspondence" was filed with the express consent of counsel for Petitioner.

The Court is respectfully referred to (a) the Motion For Leave to File Brief Amici Curiae and Affidavit of Walter P. Hickey, filed October 3, 1961, with the Court of Appeals on behalf of Christman & Company, (b) the present amici's Motion to the Court of Appeals For Leave to File Appendix to Brief and For Leave to Present Oral Argument, filed November 29, 1961, to which the Appendix was attached, and (c) the Affidavit of Victor Rabinowitz, dated December 1, 1961, filed with the Court of Appeals.

We urge that this Court not set a precedent requiring our courts to obtain "Bernstein letters" before they can apply international law to foreign decrees sought to be enforced by their process.

B. OF THE FIVE POLICY ARGUMENTS ADVANCED BY THE SOLICITOR GENERAL FOR HAVING OUR COURTS NOT APPLY INTERNATIONAL LAW WHEN A FOREIGN SOVEREIGN'S ACT IS SOUGHT TO BE GIVEN EFFECT HERE, THE FIRST THREE DO NOT REST UPON THE EXECUTIVE BRANCH'S CONDUCT OF OUR FOREIGN RELATIONS AND THE LAST TWO ARE UNPERSUASIVE.

Of the five policy arguments advanced by the Solicitor General on pages 26-34 of the Government Brief, the first three do not rest upon any special competence of the Executive Branch to conduct our foreign relations. They may, in other words, be evaluated without reference to the status of the person advancing them. The first three arguments are amply refuted at pages 24-26 of the C.A.V. Brief.

The last two arguments advanced by the Solicitor General at pages 28 and 32 of the Government Brief do relate to the Executive's conduct of our foreign relations. They are founded on expediency and convenience. Even were principle to be disregarded the arguments are unpersuasive.

It is argued that "the primary and most satisfactory way to deal with foreign acts of state which violate international law is the exercise of diplomacy" (Gov't Brief, p. 28).

With this we beg to differ. The primary objective is to deter foreign acts of state which violate international law. Only after this has failed must resort at times be had to diplomacy to redress the wrong done. The Government Brief fails to appreciate the impor-

tance of the deterrent function. This is most disturbing to the bar, as is shown in the briefs filed by the New York City Bar, the American Bar Association and the American Branch of the International Law Association. As Judge Dimock recognized in his opinion below:

> "The effective method to promote adherence to the standards imposed by international law is to enforce these standards in municipal courts, particularly in view of the poverty and inadequacy of international remedies." 193 F. Supp. 375 at 382.

This Court pointed out in *Baker* v. *Carr:* "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. 186 at 211. The failure of the Government Brief to appreciate the Judiciary's deterrent role is pointed up by the fact that it summarizes its own argument by saying that "the short of it" is that "the position to be taken by the United States regarding the legality of the acts of a foreign government within its jurisdiction should be determined by the Executive, not by individual state or federal judges." Gov't Brief, p. 30. Here the Executive's determination that the Cuban acts were "manifestly" in violation of international law has already been publicly announced, and the question is whether the Judiciary must help the taking government obtain the monetary fruits of its seizure. The Court is respectfully referred to pages 11-14 of the City Bar Brief where the relationship of the Judiciary's role to that of the Executive in this matter is more fully explored.

After a violation of international law has occurred, diplomacy is certainly *a* way to secure redress which *at times* is satisfactory, but it does not follow, nor is there

anything to support the assumption in the Government Brief, that diplomacy is the *only* way. If diplomacy were the only way, then in this very case, there is no way, since diplomatic relations with the Castro Regime are broken. If diplomacy had in fact functioned in this case, we might have a situation such as in *United States* v. *Belmont*, 301 U.S. 324, *Shapleigh* v. *Mier*, 299 U.S. 468, and *United States* v. *Pink*, 315 U.S. 203. Where the Executive Branch has itself reached a settlement, the courts, as demonstrated in these cases, have declined to "take it upon themselves" to substitute their process for one that has functioned.

The final argument advanced for surrender by the Judiciary of its freedom to apply international law to a foreign sovereign's act is stated as follows: "There can be no question that the potential power of the Executive Branch to act to protect all American interests *vis-a-vis* Cuba will be seriously hampered should American courts, contrary to the position which may be taken in future negotiations by the Executive, refuse to recognize any Cuban title whatsoever to nationalized assets" (Gov't Brief, pp. 33-34). With great deference, we submit that the Executive Branch has misunderstood the effect which application of international law in this case would have on a future settlement.

It is not contended that title to the confiscated property while in Cuba is, under Cuban law, vested other than in the Cuban Government. The property here involved has, however, left Cuba. The question is not whether this Court should challenge title in Cuba to the property in Cuba under Cuban law. The question is what effect should be given here in this country to the small portion here of the property taken or the pro-

ceeds thereof, pending the future settlement contemplated in the Government Brief.

Obviously, when a settlement is negotiated, Cuba will not be forced to give restitution or be charged for the value of property seized by it as to which our own nationals have already obtained recovery. The imagination cannot be stretched to the point of believing that affirmance of the decision of the District Court could hamper future settlement negotiations. But it will deter successor governments from future takings.

Until the Treasury issued its regulations in July, 1963, a decision such as now appears to be urged would not have resulted in a contribution to a fund for the reimbursement of "all American interests" (Gov't Brief, p. 28). The money would have gone into Castro's coffers.

If now the United States wishes to marshal the proceeds of the property of C.A.V. and other particular interests for "all American interests," it should then ask that proceedings be stayed until enactment of legislation authorizing the Government to expropriate the property of these particular business interests for the public purpose of dividing it amongst "all American interests." Such legislation would, of course, provide for just compensation. Without this, to deprive despoiled owners of their defenses, even for a high public purpose, would constitute a deprivation of property without due process of law. *Home Ins. Co.* v. *Dick*, 281 U.S. 397. This Court has held that when such a deprivation by Executive action occurs, just compensation is owing. *Cities Service Co.* v. *McGrath*, 342 U.S. 330.

In the absence of legislation of this sort, or of a treaty, entitling the Department of State to take up

the rights of certain American nationals for the benefit of a larger group, the courts are duty-bound, it is submitted, to keep themselves "free to apply public international principles in act of state cases" (Gov't Brief, p. 25).

IV. If, out of deference to the executive branch, this court feels obliged to ignore part of the law governing this case, it is under a duty to decline to adjudicate the case.

The Executive Branch has now informed this Court (for the first time in this three-year old litigation) that the Judiciary should have ignored international law and refused to measure the Cuban decree against its standards. Why? Because, it says, its conduct of our foreign relations might be embarrassed if our courts applied *all* of the governing law, including international law.

If the Executive Branch, *for its own special reasons of high policy,* wishes a court to deny to one side in a lawsuit the application of certain governing principles of law, it is of course free to say so. But it has no standing to expect any court to adjudicate the controversy on less than all of the applicable law.

As this Court said in connection with a counterclaim against a sovereign:

> "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." *National Bank* v. *Republic of China,* 348 U.S. 356, 361-62.

This Court, of course, refused in that case to give justice to only one side.

If in this case this Court feels it must accept the view that it would embarrass the Executive's conduct of foreign relations to have international law applied in this case, then this Court should decline to adjudicate the controversy, either by directing dismissal of the complaint or by directing that adjudication on the merits be postponed until a time when the policy of the Executive is consistent with a judgment on the merits.

To do otherwise—to give automatic effect to the foreign decree without regard to its violation of international law—is not the proper judicial disposition of the case at bar. If the Court is to lend its judicial process to the controversy, it must apply the law it is duty-bound to apply. If it decides it cannot apply the law in its entirety, as the Executive has suggested, it should decline to exercise jurisdiction. The proper disposition would then be dismissal of the complaint for failure to state a justiciable claim since Petitioner's case necessarily rests on establishment of the legitimacy of its claim.

This result would be wholly consistent with the act of state cases even if the doctrine of those cases were extended to immunize alleged violations of international law from judicial scrutiny. This is so because *every one* of the cases where that doctrine has been applied was a case in which the plaintiff was the former owner whose property had been expropriated, and who, in order to prevail, had to induce the court to hold that the defendant in possession of the property had acquired his title through some means which allegedly the court should disapprove, but which it

found strong reasons for refusing to examine. Faced with this situation, the courts evolved the act of state doctrine, which leaves the parties in their existing position. The doctrine has been applied as a shield, never as a sword. The doctrine has never been applied, and should never be applied, to justify the award of judgment to a plaintiff basing its claim on an act in violation of international law.[17] In not one of the American act of state cases has a court at the behest of a foreign sovereign (or its successor in interest) applied the act of state doctrine in such a way as to support an award to that sovereign based upon assumptions, into the correctness of which the court was prevented from inquiring.

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[17] In this respect the present case resembles the act of state cases much less closely than it does the well-known line of cases in New York which refused on the ground of public policy to give affirmative effect to confiscatory foreign decrees, whether they may also violate international law or not. United States v. Moscow Fire Ins. Co., 280 N.Y. 286 (1938), *aff'd by equally divided court*, 309 U.S. 624; Vladikavkazsky Ry. Co. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934); Plesch v. Banque Nationale de la République d'Haiti, 273 App. Div. 224, 77 N.Y.S. 2d 43 *aff'd per curiam*, 298 N.Y. 573 (1948); Bollack v. Société Générale Pour Favoriser, 263 App. Div. 601, 33 N.Y.S. 2d 986 (1942); Zwack v. Kraus Bros. & Co., 133 F.Supp. 929 (S.D.N.Y. 1955), *aff'd in part*, 237 F.2d 255 (2d Cir. 1956). See also New York Civil Practice Act, Section 977-b. See also Dicey, Conflict of Laws 159 (7th ed. 1958): "RULE 21. The court has no jurisdiction at common law to entertain an action— . . .

(2) where the grounds of action involve an act of state."

In commenting at page 163 on a factual situation similar to the facts in this case, Dicey writes:

> ". . . It is conceived that the latter [foreign State] has a valid but unenforceable title: valid because the property was situate within its jurisdiction at the appropriate time, but unenforceable because the court has no jurisdiction to countenance a claim by the foreign State based upon an exercise of foreign power."

An illuminating example of the proper nature and scope of the act of state doctrine is *Bernstein* v. *Van Heyghen Frères Société Anonyme*, 163 F. 2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772, where the Court affirmed dismissal of an action on the ground that it was prevented from adjudicating the merits of plaintiff's claim that he had been deprived of his property in a manner contrary to the public policy of the forum (though not in violation of international law).[18] The Court stated:

> ". . . [T]he plaintiff's difficulty lies, not in any defect in the law of New York as to conflict of laws; but because of that other doctrine which we have mentioned: i.e., that no court will exercise its jurisdiction to adjudicate the validity of the official acts of another state." 163 F. 2d at 249-250.

Judge Hand makes it clear that the act of state doctrine is one of judicial abstention, and thus that a court, when presented with a controversy which is essentially closed off to the judicial process, is powerless to proceed to a resolution of that controversy.

> "Finally, we see no reason to disturb that part of the order which dismissed the complaint. As it stands, the district court had no power to proceed; and, while it may not be proper, *stricti juris*, to say that it had no jurisdiction, that is a mere question of words. It is enough that the court was powerless to move in it." 163 F. 2d at 252.

The Executive has taken the position that the effect to be given the Cuban decree is a question demanding a single-voiced answer, and that the answer is confided to the Executive, not to the Court. If the Court is in agreement with the Executive on this point, it should completely withdraw its process and leave the ques-

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[18] See pp. 6, 20-21, *supra*.

tion to the Executive.[19] It cannot refuse inquiry into the international legality of the Cuban decree because of its "political" nature and at the same time impliedly accept the legality of the Cuban decree by directing judgment for Petitioner.

By affirmance of the dismissal this Court would in no way lessen the control of the Executive over issues having political overtones. Such a disposition, while preserving the Court's independence, preserves to the State Department its function of dealing with foreign governments seeking redress from our Government.

While there were a number of opinions in *Baker* v. *Carr,* including two dissenting ones, all agreed that where the pivotal issue in a controversy becomes nonjusticiable, the proper disposition of the case is to dismiss. The principle is graphically put in Mr. Justice Frankfurter's dissenting opinion:

> "Where the [political] question arises in the course of a litigation involving primarily the adjudication of other issues between the litigants, the Court accepts as a basis for adjudication the political departments' decision of it. But where its determination is the sole function to be served by the exercise of the judicial power, the Court will not entertain the action." 369 U.S. at 282.

Petitioner, an agency of the Cuban Government, rests its case solely on the decree issued by the Cuban Government on August 6, 1960. It cannot be maintained that the Court is presented "primarily" with the adjudication of issues other than the "political" issue. As both courts below indicated by their opinion, the determination of the allegedly "political" question

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[19] Note the language of Justice Brennan in Baker v. Carr, 369 U.S. 186 at 210: "The nonjusticiability of a political question is primarily a function of the separation of powers."

is the sole function to be served by the exercise of the judicial process. If deference to the Executive demands that the issue be not adjudicated, this Court is in no way bound to tarnish its own process by instructing the District Court to enter judgment for Petitioner on the basis of a foreign act violative of international law.

CONCLUSION

It is respectfully submitted that the decision of the District Court should be affirmed for the reasons stated herein and in the opinion of that Court.

In the alternative, if this Court should decide that a decision on the merits would embarrass the Executive in the conduct of the foreign relations of the United States, then the judgment of the District Court dismissing the complaint should be affirmed for the reason that the controversy has become nonjusticiable, or judgment should be postponed until a time when the policy of the Executive is consistent with a judgment on the merits.

Respectfully submitted,

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